84-440

No. 83-1575

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IN THE

Supreme Court of the United States

HARRIS COHEN AND OLGA COHEN, h/w

Petitioners,

—against—

CITY OF PHILADELPHIA
and
WILLIAM J. GREEN, MAYOR OF PHILADELPHIA
and
MORTON B. SOLOMON, POLICE COMMISSIONER
OF PHILADELPHIA
and
CIVIL SERVICE COMMISSION
and
ANTHONY D'AMATO, PERSONNEL DIRECTOR
OF PHILADELPHIA
and
W. WILSON GOODE, MANAGING DIRECTOR OF PHILADELPHIA

Respondents.

PETITION OF HARRIS AND OLGA COHEN FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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PRESS OF ALLEN, LANE & SCOTT, INC., PHILADELPHIA

34 pp

QUESTION PRESENTED FOR REVIEW

1. Whether Petitioner was deprived of property without due process of law when the Civil Service Commission, acting under the authority of Section 7.7-201 of the Philadelphia Home Rule Charter giving it broad discretionary powers to decide whether to award back pay to an employee reinstated to his former position, denied an award of back pay to Petitioner, upon reinstating him to the police force, because it found him guilty of derelictions which he had not previously been charged with.

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PETITION OF HARRIS AND OLGA COHEN FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS—THIRD CIRCUIT

DECISIONS BELOW

Cohen, Harris and Cohen, Olga, h/w v. City of Philadelphia, et al. 736 F.2d 81 (1984) reprinted here at Appendix "A". The Order of the United States District Court for the Eastern District of Pennsylvania is unreported and is reprinted here as Appendix "B". The Opinion of the Civil Service Commission of the City of Philadelphia is also unreported and is reprinted here as Appendix "C".

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

42 U.S.C. §1983 (Supp. V1981) provides in part:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action of laws, suit in equity, or other proper proceeding for redress."

Section 7.7-201 of the Philadelphia Home Rule Charter provides:

> "If the Commission sustains the appeal on the ground that the action complained of was taken by the appointing authority for any political, religious or racial reason, or labor union activity lawful for municipal employees, it shall order the employee to be reinstated to his former position

without loss of pay for the period of his suspension. In all other cases where the Commission sustains the appeal of the employee it shall order the reinstatement of the employee in his former position *with or without loss of pay for the period of his suspension* or direct that he be appointed to a position of equal status in the same office, department, board or commission with or without loss of pay for the period of his suspension. If the Commission overrules the appeal of the employee, it shall confirm the action of the appointing authority which shall be final as of the date it was taken."

351 Pa. Admin. Code §7.7-201 (Shepard's 1983) (emphasis added).

STATEMENT OF THE CASE

This Petition seeks review of an affirmance by the United States Court of Appeals, Third Circuit, of an Order granting Respondent's Motion for Summary Judgment entered in the United States District Court for the Eastern District of Pennsylvania on July 13, 1983.

The undisputed facts are as follows:

On May 26, 1980, Petitioner, Harris Cohen, who had been employed as a police officer for seven and one-half years by the City of Philadelphia, was dismissed for suspected participation in a burglary. After being acquitted in a criminal trial, he appealed his dismissal to the Civil Service Commission which, after a hearing, decided that there was insufficient evidence to implicate Cohen in criminal activity and reinstated him to his former position with the police force.

The Commission, however, decided that said reinstatement be without back pay because it determined that prior to the burglary, Cohen had violated a Police Department directive by making a loan to a superior.

Petitioner brought an action against the City of Philadelphia and its officers in the United States District Court for the Eastern District of Pennsylvania, claiming that the Commission's action had deprived him of property without due process of law in violation of 42 U.S.C. §1983.

The District Court concluded that Cohen had sufficient remedies in state law, and that under the rule announced in *Parratt v. Taylor,* 451 U.S. 527 (1981) he had not been deprived of property without due process.

Petitioner appealed to the United States Court of Appeals for the Third Circuit that Court recognized that the Civil Service Commission by denying back pay, had deprived Petitioner Cohen of property without due process of law but it held that substantive mistakes by administrative bodies in applying local ordinances do not create a federal claim so long as correction is available by the state's judiciary and that under the circumstances of this case, *Parratt v. Taylor,* supra, bars suit.

BASIS OF JURISDICTION IN THE DISTRICT COURT

The Federal Jurisdiction of the United States District Court of Pennsylvania was based upon Title 42 U.S.C. §1983 of the Civil Rights Act.

REASONS FOR GRANTING THE WRIT

The decisions of the Courts below refused to consider Petitioners' action as attacking the constitutionality and sufficiency of the provision contained in §7.7-201 of the Philadelphia Home Rule Charter giving total discretion to the Civil Service Commission to, in some cases, deny back pay to an employee who after a suspension has been reinstated to a former position.

In determining whether an individual has been deprived of property without due process of law a court must consider whether the deprivation resulted from "a random and unauthorized act by a state employee" or, instead, said deposition occurred as a result of "some established state procedure." *Parratt v. Taylor* 451 U.S. 527 (1981).

The Court of Appeals holding that the state has provided Petitioner with due process by providing "reasonable remedies to rectify a legal error by a local administrative body was premised on a determination that the deprivation occurred as a result of the 'Commissioner's error' and not from the 'state system itself' ". (See Opinion p.7). This, Petitioner contends, was error.

The Commission's decision was not an "unauthorized act by state employees" but rather an action expressly sanctioned and authorized by Section 7.7-201 of the Philadelphia Home Rule Charter giving the Commission broad discretion, in most cases, whether to award back pay upon reinstatement of an employee to a former position. It does not contemplate any procedural due process requirements for situations like Petitioner's.

The Commission's Opinion makes it very clear that its decision denying back pay is taken by virtue of the broad powers

granted to it by the Charter. The Opinion reads in relevant part:

> "Although we are ordering Appellant reinstated to his former employment, in the exercise of our power under the Charter and the Civil Service Regulations, we do find said reinstatement to be without back pay or any other emoluments."

Petitioner's challenge was, directly or indirectly, addressed not simply to the correctness of the adjudication of his case, as believed by the Court of Appeals, but rather at the constitutionality of the above section of the Charter which enabled the Commission to decide the way it did. It was a challenge to state procedure established by virtue of the existence of §7.7-201 of the Philadelphia Home Rule Charter.

Petitioner was denied due process by the state; the Commission's actions were simply a product of a constitutionally defective provision.

The fact that Petitioner or others similarly situate could obtain relief from Pennsylvania Courts does not make this provision constitutional or otherwise acceptable. In so far as Petitioners' challenge is directed to an overly broad provision of the Charter, it cannot be barred by the holding of *Parratt v. Taylor*, supra.

CONCLUSION

IN THIS CASE, THE COURTS BELOW ERRED IN HOLDING THAT *PARRATT V. TAYLOR* BARS PETITIONERS' ACTION. PETITIONERS' DEPRIVATION OF PROPERTY DID NOT OCCUR AS A RESULT OF "UNAUTHORIZED ACTS BY STATE EMPLOYEES". THE CIVIL SERVICE COMMISSION IS GRANTED EXPRESS AUTHORITY TO REFUSE BACK PAY IN SITUATIONS SIMILAR TO PETITIONERS', BY THE RELEVANT PROVISION OF THE HOME RULE CHARTER. PETITIONERS' DEPRIVATION RESULTED FROM THE DEFECTIVENESS OF AN "ESTABLISHED STATE PROCEDURE". PETITIONERS DID NOT CHALLENGE THE ACTION OF INDIVIDUALS ACTING OUTSIDE THE SCOPE OF THEIR AUTHORITY. THE COURT OF APPEALS, AGREEING WITH THE MERITS OF PETITIONERS' CASE, WAS UNDULY TECHNICAL WHEN IT HELD THAT NO DIRECT ATTACK WAS MADE TO AN ESTABLISHED STATE PROCEDURE.

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-1575

COHEN, HARRIS and COHEN, OLGA, h/w
vs.
CITY OF PHILADELPHIA
and
GREEN, WILLIAM J.
Mayor, City of Philadelphia
and
SOLOMON, MORTON B., Police Commissioner,
City of Philadelphia
and
CIVIL SERVICE COMMISSION
City of Philadelphia
and
D'AMATO, ANTHONY, Personnel Director
City of Philadelphia
and
GOODE, W. WILSON
Managing Director, City of Philadelphia
HARRIS COHEN and OLGA, his wife, *Appellants*

Appeal From the United States
District Court For the
Eastern District of Pennsylvania
D.C. Civil No. 82-1428

Argued March 6, 1984
Before: HUNTER, BECKER, *Circuit Judges*,
and HOFFMAN,* *District Judge*

Opinion filed June 6, 1984

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* Honorable Walter E. Hoffman, United States District Judge for the Eastern District of Virginia, sitting by designation.

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OPINION OF THE COURT

HUNTER, *Circuit Judge:*

1. Harris Cohen, appellant,[1] was employed as a police officer with the City of Philadelphia for approximately seven and one half years before his dismissal on May 26, 1980 for suspected participation in a burglary. After being acquitted in a criminal trial Cohen was reinstated without back pay. He now sues the City of Philadelphia and certain of its officers claiming that they deprived him of property without due process of law in violation of 42 U.S.C. §§ 1983[2] and 1985[3] (Supp. V 1981). The district court granted summary judgment in the defendants' favor and Cohen appeals. We will affirm.

I.

2. On May 5, 1980, while appellant was on duty, one or more police officers burglarized the Cobbs Creek Appliance Store in Philadelphia. Cohen was one of four police officers arrested and charged in connection with the burglary. Two of these officers, Klein and Ricciardi, pled guilty and furnished information to the Police Department and the District Attorney's Office in furtherance of their investigation. It was

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1. Harris Cohen brought this suit together with his wife, Olga Cohen. Mrs. Cohen's claims are entirely derivative of her husband's. For clarity we refer throughout this opinion only to Harris Cohen.

2. 42 U.S.C. § 1983 (Supp. V 1981) provides in part:

> Every person who, under color of any statute ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

3. Cohen's §1985 claim, which is not pressed on appeal, is clearly without merit because Cohen fails to allege a "class-based, invidiously discriminatory animus behind the conspirators' action." *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971). We therefore do not address it further.

learned during the course of this investigation that Klein paid Cohen $100 following the burglary. Based upon this fact and the surrounding circumstances, the department dismissed Cohen.

3. Police Commissioner Solomon informed appellant in writing on May 27, 1980 that he had been discharged effective May 26, 1980 for his participation in the burglary. The Philadelphia Civil Service Regulations provide that an employee who has been discharged may appeal to the Civil Service Commission within thirty days to obtain a review of the decision. Appellant made no attempt to appeal his discharge within thirty days.

4. In March, 1981, Cohen was acquitted of all criminal charges. He then petitioned for and received an order from the Court of Common Pleas allowing him to file his Civil Service Commission appeal nunc pro tunc. He appealed his dismissal to the Civil Service Commission on September 3, 1981—a full one and one half years after his dismissal.

5. The Civil Service Commission heard Cohen's appeal on December 16, 1981. At that hearing, the transcript from Cohen's criminal case was submitted. Cohen testified and admitted receiving $100 from Ricciardi, but stated that the $100 was in repayment of a loan made to Klein, his former superior, shortly before the burglary. On January 8, 1982, the Civil Service Commission issued its opinion. The Commission concluded that there was insufficient evidence to implicate Cohen in criminal activity. It determined, however, that appellant had violated a Police Department directive in making a loan to a superior. The Commission therefore ordered his reinstatement, but held that the reinstatement should be without back pay.

6. At that point, Cohen had the opportunity to petition for rehearing before the Civil Service Commission, and to appeal the Commission's decision to the Philadelphia Court of Common Pleas and onward through the state appellate system. He chose not to do so. Rather, Cohen brought this action in federal court pursuant to section 1983, asserting that he had been deprived of property without due process of law.

7. Cohen asserted in the district court and on appeal that his right to due process was violated by the failure to afford him a pre-termination hearing, and by the later failure to award him back pay upon reinstatement.[4] The district court concluded that Cohen had sufficient remedies in state law, and that under the rule announced in *Parratt v. Taylor*, 451 U.S. 527 (1981), therefore, he had not been deprived of property without due process. We will affirm.

II.

8. In any section 1983 action two essential elements must be established: (1) that the conduct complained of was committed by a person acting under color of state law; and (2) that this conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States. *Parratt*, 451 U.S. at 535. The first prong of the test is clearly met in this case: Philadelphia and the individual defendants undisputedly acted under color of state law. For the purposes of this appeal, therefore, we must focus on whether Cohen was deprived of rights, privileges, or immunities secured by the Constitution or laws of the United States.

9. Cohen alleges that he was deprived of a constitutional right when he suffered a deprivation of property without due process of law in violation of the Fourteenth Amendment.[5] De-

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4. He also argues on appeal that summary judgment should not have been granted because of the existence of genuine issues of material fact. We do not agree. At best, Cohen's allegations in opposition to defendants' motion for summary judgment were repetitions of the conclusory allegations in his complaint, and therefore not sufficient to defeat a motion for summary judgment. *See, e.g., United States v. Allen*, 578 F.2d 236, 237 (9th Cir. 1978); *Brown v. Ford Motor Co.*, 494 F.2d 418, 420 (10th Cir. 1974).

5. Cohen also contends that the dismissal implicated his liberty interests. He does not, however, allege that the accusations were publicly disclosed. Public disclosure must be established before accusations can even be considered as violating a liberty interest. *See Bishop v. Wood*, 426 U.S. 341, 348 (1976). We do not decide whether a liberty interest was ever present in this case. Cohen had the right to demand a hearing, which would give him the opportunity to clear his name, within thirty days of his discharge. He has since exercised that right and cleared his name.

fendants concede that Cohen possessed a property interest in his job. The only question remaining for our resolution, therefore, is whether Cohen was deprived of this property interest without due process of law.

10. Cohen argues from two different angles that his right to due process was offended by the failure to award him back-pay. First he argues that due process requires that he be given a pretermination hearing unless his right to back-pay is absolutely guaranteed upon his being vindicated of the charged misconduct.[6] Second, he argues that the Commission violated due process in practice by refusing to award him back-pay after concluding that he was guilty only of derelictions that had not been included in the charge against him.

11. We, like Cohen, are skeptical that Philadelphia could constitutionally establish procedures allowing it to dismiss employees without a hearing and to deny back-pay even if the charges supporting discharge later prove unfounded. In balancing "the importance of the private interest and the length or finality of the deprivation; the likelihood of governmental error; and the magnitude of the governmental interests involved," *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 434 (1982) (citations omitted), we might well find that such a system denied the employee due process of law. Similarly, we are sympathetic to Cohen's argument that he could not constitutionally be denied back-pay on the basis of charges conceived by the Commission after his hearing—charges of which he had never been informed and against which he had never been given an opportunity to defend. The right to a hearing is certainly of little value without prior notice of the charges presented, in sufficient detail fairly to enable the party charged to demonstrate any error that might exist. *See Goss v. Lopez*, 419 U.S. 565, 579 (1975); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).[7]

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6. We do not understand Cohen to argue that he is entitled to a pretermination hearing even if he is guaranteed back-pay upon reinstatement. Nor would we be persuaded by such an argument. The procedures established by the Philadelphia Home Rule Charter and the Civil Service Regulations promulgated thereunder are virtually identical to those approved by the Supreme Court in *Arnett v. Kennedy*, 416 U.S. 134 (1974).

7. The facts of this case illustrate the usefulness of prior detailed notifi-

12. With all of this conceded to Cohen, however, he has not established that the state failed to provide him due process of law. In this case, as in *Parratt*, the initial deprivations cannot be viewed in isolation. Rather, we must also consider whether the deprivation resulted from a "random and unauthorized act by a state employee" or, instead, occurred as the result of "some established state procedure." *Parratt*, 451 U.S. at 541. If we conclude that Cohen's deprivation resulted from the "Commission's error" rather than from "the state system itself," *Logan*, 455 U.S. at 436, we must then consider whether the means of redress provided by the state satisfy the requirements of the Due Process Clause. In such a case, Cohen will have established a section 1983 claim only if the remedies provided by the state do not comport with the requirements of due process.

13. We conclude that Cohen was entitled to back pay after the charges against him proved unfounded, and that the failure to award him back-pay was the result of Commission error. Although the Philadelphia Home Rule Charter is ambiguous at best regarding the Commission's discretion over back pay,[8] it

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cation of pending charges. The Commission denied Cohen back pay after concluding that he had violated Section 5.1 of the Disciplinary Code of the Police Force: "Soliciting money or any valuable thing without proper authorization." Cohen thus had a very strong argument that he did not violate this directive by *loaning* money. He could also have argued that deprivation of back pay was far too harsh a punishment for violating Section 5.1, which authorizes only a five to ten day suspension for its violation.

8. Section 7.7-201 of the Philadelphia Home Rule Charter provides:

> If the Commission sustains the appeal on the ground that the action complained of was taken by the appointing authority for any political, religious or racial reason, or labor union activity lawful for municipal employees, it shall order the employee to be reinstated to his former position without loss of pay for the period of his suspension. In all other cases where the Commission sustains the appeal of the employee it shall order the reinstatement of the employee in his former position *with or without loss of pay for the period of his suspension* or direct that he be appointed to a position of equal status in the same office, department, board or commission with or without loss of pay for the period of his suspension. If the Commission overrules the appeal of the employee, it shall confirm the action of the appointing authority which shall be final as of the date it was taken.

351 Pa. Admin. Code § 7.7-201 (Shepard's 1983) (emphasis added).

has been interpreted to require the Commission to award back pay to a *wrongfully* discharged employee—one who is not proven to have committed the acts for which he was discharged. *See Gallagher v. Civil Service Commission*, 16 Pa. Commw. 279, 330 A.2d 287 (1974) (Commission reinstated officer acquitted of charges against him, but denied back pay because evidence raised "inference" of conduct unbecoming an officer; portion of Commission's order denying back pay reversed).

14. Nor may the Commission deprive Cohen of an otherwise required award of back pay because it has found him guilty of derelictions with which he had not previously been charged. The Philadelphia Home Rule Charter requires that discharged employees be given specific notice of the charges they will face if they choose to appeal to the Civil Service Commission.[9] The Philadelphia Civil Service Regulations, promulgated pursuant to the Charter, also require that a dismissed employee be given notice both of the charges against him and the facts supporting those charges.[10] Pennsylvania case law further confirms that the Civil Service Commission may not, for any purpose, consider

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9. The Philadelphia Home Rule Charter requires the city Personnel Director to prepare regulations providing for:

> (q) Discharge or reduction in rank or grade after appointment or promotion is completed only after the person to be discharged or reduced has been presented with the reasons for such discharge or reduction, specifically stated . . .

351 Pa. Admin. Code § 7.7-401 (Shepard's 1983). The accompanying notes explain that subsection q is intended to ensure that a dismissed employee will be aware of all charges against him so he may decide whether to appeal his dismissal:

> Employees discharged or demoted have a right of appeal to the Civil Service Commission. See Annotation to Section 7-201. This subsection is necessary so that they may know the reasons for the action taken and on that basis decide upon the question of appealing.

10. "The notice to the employee must state the specific reasons for the dismissal or demotion and summarize the facts in support thereof with sufficient particularity to allow the employee to prepare a defense to the charges." Philadelphia Civil Service Regulations, § 17.01.

whether an individual has committed acts with which he has not previously been charged. *See City of York v. Dinges*, 21 Pa. Commw. 322, 328, 345 A.2d 776, 780 (1975) (argument that plaintiff should have been dismissed in any event because of future ineffectiveness could not properly be considered because he was never charged with future ineffectiveness). The Commission therefore violated Pennsylvania law[11] both in failing to award Cohen back pay and in considering whether he had committed acts with which he had not previously been charged.

15. Like the complainant in *Parratt*, however, Cohen has established no more than an unauthorized failure of state agents to follow prescribed procedures:

> Although he has been deprived of property under color of state law, the deprivation did not occur as a result of some established state procedure. Indeed, the deprivation occurred as a result of the unauthorized failure of agents of the State to follow established state procedure.

Parratt, 451 U.S. at 543. Under the rule announced in *Parratt*, these errors did not deprive appellant of due process so long as the State provided him with a means by which to receive redress for the deprivation. "[T]he State . . . has provided respondent with the means by which he can receive redress for the deprivation. . . . The remedies provided could have fully compensated the respondent for the property loss he suffered, and we hold that they are sufficient to satisfy the requirements of due process." *Id.* at 543-44.

16. In this case, Pennsylvania has provided for judicial review of the Commission's actions. The courts of Pennsylvania are empowered to correct any of the Commission's actions which are manifest abuses of discretion, are contrary to law, or rest on findings of fact which are not supported by substantial evidence. *See* 2 Pa. Cons. Stat. Ann. §754 (Purdon Supp. 1982); *McLafferty v. Civil Service Commission*, 68 Pa.Commw. 632, 634, 450 A.2d 253, 254 (1982); *Fitzgerald v. Civil Service*

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11. The Philadelphia Civil Service Regulations are deemed to have "the force and effect of law . . ." 53 Pa. Stat. Ann. §12633 (Purdon 1957).

Commission, 16 Pa.Commw. 540, 330 A.2d 285, 286 (1974). And, we note, Pennsylvania courts seem every bit as determined as the federal courts to prevent the type of wrongs that occurred in this case. *See, e.g., Dinges*, 21 Pa.Commw. at 328, 345 A.2d at 780; *Gallagher*, 16 Pa.Commw. at 279, 330 A.2d at 287.

17. We thus join the First and Seventh Circuits in holding that substantive mistakes by administrative bodies in applying local ordinances do not create a federal claim so long as correction is available by the state's judiciary.[12] Any other holding would lead to the danger that:

> "any plaintiff in state court who was asserting a right within the broadly defined categories of liberty or property and who lost his case because the judge made an error could attack the judgment indirectly by suing the judge under section 1983. That would be an intolerable interference with the orderly operations of the state courts. Due process is denied in such a case only if the state fails to provide adequate machinery for the correction of the inevitable errors that occur in legal proceedings. . . ."

Ellis v. Hamilton, 669 F.2d 510, 514 (7th Cir.), *cert. denied, sub nom. Ellis v. Judge of the Putnam Circuit Court*, 103 S. Ct. 488 (1982). In this case, because Pennsylvania has provided a

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12. *See, e.g., Albery v. Reddig*, 718 F.2d 245, 249 n.7 (7th Cir. 1983) ("The complaint here does not allege that existing state procedures are inadequate to remedy the alleged negligence of the local officials. Instead, it asks the federal courts to correct substantive mistakes that may have been made in applying local ordinances in the early stages of the zoning process. The allegedly negligent errors in applying local law do not violate the plaintiffs' due process rights as long as adequate state procedures are available to remedy those errors."); *Roy v. City of Augusta*, 712 F.2d 1517, 1524 (1st Cir. 1983) ("This theory is to be distinguished from claims that local officials erred in not issuing licenses. Even when errors are extreme, they do not implicate the basic adequacy of the state's *process*, especially when correction is available by the state's judiciary") (emphasis in original); *Creative Environments, Inc. v. Estabrook*, 680 F.2d 822, 832 n.9 (1st Cir.) ("[W]here—as here—the state has erected a complex statutory scheme and provided for avenues of appeal to the state courts, property is not denied without due process simply because a local planning board rejects a proposed development for erroneous reasons or makes demands which arguably exceed its authority under the relevant state statutes."), *denied*, 103 S. Ct. 345 (1982).

means of correcting the errors that will sometimes occur at the administrative level, no deprivation without due process of law has occurred.

18. Cohen argues that to require him to proceed in state court is to require a section 1983 plaintiff to exhaust his state remedies before proceeding in federal court, contrary to *Patsy v. Board of Regents*, 457 U.S. 496 (1982). Exhaustion is not however the issue. The necessary predicate to the claim for relief is that there has been a denial of due process under state procedures. Our holding is that the state has provided Cohen with due process by providing "reasonable remedies to rectify a legal error by a local administrative body," *Creative Environments, Inc. v. Estabrook*, 686 F.2d 822 n.9 (1st Cir.), *cert. denied*, 103 S. Ct. 345 (1982), and that therefore he has not alleged a constitutional violation entitling him to sue under section 1983. Although Cohen has waived his state law avenues of relief by his inaction, the very existence and apparent efficacy of such remedies defeats his claim that he was deprived of property without due process of law.

19. We do not hold that the fact that a state-law cause of action exists under which a plaintiff may recover for an alleged constitutional violation is always sufficient to prevent the defendants from having to answer in federal court under section 1983. In this case, the contention is that a state agency erred in its adjudication of plaintiff's claim against the state. There is no claim that the plaintiff did not have recourse to the state courts, that the agency was acting according to a state policy in denying plaintiff's claim, or that the state proceeding was constitutionally defective or insufficient. At least under these circumstances, we believe that *Parratt* bars this suit.

III.

20. Accordingly, we conclude that Cohen was not deprived of property without due process of law. The judgment of the district court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

HARRIS COHEN and OLGA, h.w.	:	CIVIL ACTION
v.	:	
CITY OF PHILADELPHIA, et al.	:	NO. 82-1428

ORDER

AND NOW, this 12th day of July, 1983, upon consideration of the defendants' motion for summary judgment, it appearing to the court that there are no material facts in dispute and that the rule of *Parratt v. Taylor,* 451 U.S. 527 (1981) is controlling here, it is

ORDERED

that defendants' motion for summary judgment is GRANTED and

JUDGMENT

is hereby entered in favor of the defendants and against the plaintiffs.

BY THE COURT

JOSEPH L. McGLYNN, JR. J.

APPENDIX C

CIVIL SERVICE COMMISSION

City of Philadelphia

Appeal of :

Case No. 2148 S&D

HARRIS A. COHEN :

Appeal under Regulation 17.061 heard
December 16, 1981 620 Municipal Services Building
Before:
Leonard L. Ettinger
Harry A. Bailey, Jr.
Commissioners
Appearances:
James K. Grasty, Assistant City Solicitor,
Robert J. Simmons, Esq., Deputy City Solicitor,
on behalf of Police Department
Alfonso Tumini, Esq., on behalf of Appellant

OPINION

This is an appeal under Civil Service Regulation 17.061 by appellant, a former Philadelphia police officer, from his dismissal effective May 26, 1980, the assigned causes thereof being as follows:

> *"CONDUCT UNBECOMING AN OFFICER:* 'On Monday, 5/5/80 a burglary was committed at Cobbs Park Electric Supply, 608 S. 62nd Street, in which approximately $6500 in TV's and Air Conditioners were taken. (At the time of the incident you were working the 12 to 8 A.M. shift in the 18th District.)'
>
> "'As a result of an investigation by our Internal Affairs Bureau, you were implicated in the above burglary and arrested on 5/14/80 for your involvement in this crime. You were charged with burglary, theft, conspiracy and receiving stolen property.'

"'Your involvement in this incident indicates that you have little or no regard for your responsibilities as a Philadelphia Police Officer.'"

The events leading up to appellant's dismissal were that on May 5, 1980 a burglary occurred at the Cobbs Park Electric Supply Company at 608 South 62nd Street. Philadelphia, Pennsylvania. It was further established during the burglary television sets and air conditioners were removed from the premises.

As a result of an investigation, it was determined that the perpetrators were members of the Philadelphia Police Department. Subsequently, four police officers were arrested and charged with either directly participating in the burglary or covering up the episode. Two of those former officers, Messrs. Klein and Ricciardi, were indicted, pled guilty and furnished information to the Police Department and the District Attorney's Office in furtherance of the investigation.

It was learned during the course of the investigation that following the burglary Klein paid $100 to appellant. Based upon this fact and the surrounding circumstances, the department initiated a dismissal action against appellant despite the fact that both Klein and Ricciardi testified in the criminal proceedings that appellant was not involved in any way with the described criminal activity.

At the hearing before this Commission, appellant testified and admitted receiving $100 from Mr. Klein who was his former superior (his corporal). Appellant stated that he had made a loan to Corporal Klein of $100 about a month before the burglary when the request was made of him by his corporal.

There was no evidence or testimony presented linking appellant to the burglary of May 5, 1980 or to a conspiracy in planning the crime or the subsequent escape and cover-up by the perpetrators. The sole link to appellant was the payment of $100 to him by Klein.

In our judgment, there is insufficient evidence to find appellant was involved in planning or participation in the criminal activity of Klein and Ricciardi. We accept appellant's explanation that the money paid to him was in repayment of a personal loan absent evidence to the contrary. As a result of this deter-

mination, we order appellant reinstated to his former position as a police officer on the first day of the next pay period following the date of this Opinion or as soon as practicable thereafter.

Although we are ordering appellant reinstated to his former employment, in the exercise of our power under the Charter and the Civil Service Regulations, we do find said reinstatement to be without back pay or any other emoluments.

The reason for so ruling is found in appellant's conduct. In our judgment, what he did warrants a long period of suspension. Appellant violated a Police Department directive in making a loan to his superior. This is prohibited conduct.

Accordingly, this appeal is sustained in the manner set forth above. We so certify to the Personnel Director and the appropriate authorities.

Leonard L. Ettinger

January 8, 1982

Harry A. Bailey, Jr.
Commissioners

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

June 6, 1984

TO: Michael Anthony De Fino, Esq.
De Fino, De Fino & De Fino, P.C.

Pamela Foa, Esq.*
Russell S. Endo, Esq.

NOTICE OF JUDGMENT

This Court's opinion was filed and Judgment was entered today in case No. 83-1575 and copies are enclosed herewith.

PETITION FOR REHEARING (FRAP 40)

Your attention is specifically directed to Chapter VIII B of the Court's Internal Operating Procedures.

B. Rehearing In Banc.
Rehearing in banc is not favored and ordinarily will not be ordered except

(1) where consideration by the full court is necessary to secure or maintain uniformity of its decisions, or
(2) where the proceeding involves a question of exceptional importance.

This Court does not ordinarily grant rehearing in banc where the panel's statement of the law is correct and the controverted issue is solely the application of the law to the circumstances of the case.

When a petition for rehearing has been filed by a party as provided by FRAP 35(b) or 40(a), unless the petition for panel rehearing under 40(a) states explicitly it does not request in banc hearing under 35(b), it is presumed that such petition requests both panel rehearing and rehearing in banc.

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*See Bill of Costs form attached.

Filing Time

A petition may be filed within 14 days after entry of judgment. No extension will be granted save for the most compelling reasons. The petition must be *received* in the Clerk's office within the 14 day period.

The petition shall state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner desires to present. No answer to a petition for rehearing will be received unless requested by the court. Oral argument in support of the petition will not be permitted.

Statement of Counsel

Where the party petitioning for rehearing in banc is represented by counsel, the petition shall contain, so far as is pertinent, the following statement of counsel:

> "I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to decisions of the United States Court of Appeals for the Third Circuit or the Supreme Court of the United States, and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this Court, to-wit, the panel's decision is contrary to the decision of this Court or the Supreme Court in [citing specifically the case or cases],
>
> Or, that this appeal involves a question of exceptional importance, to-wit [set forth in one sentence]."

Form

The 15 page limit allowed by the Rule shall be observed.

Number of Copies

An original and 11 copies of a petition for rehearing before the Court in banc is required.

An original and 3 copies of a petition for rehearing before the original panel is required.

Bill of Costs (FRAP 39)

Filing Time	A party to whom costs are allowed, who desires taxation of costs, shall file a bill of costs within 14 days after judgment. The bill of costs must be *received* in the Clerk's office within the 14 day period.
Form	Counsel desiring to have costs taxed against the unsuccessful party under Rule 39, FRAP is requested to furnish an itemized and verified statement from the printer showing the actual costs per page for reproducing the brief and appendix (if any). Proof of service of the bill of costs must be attached to the bill.

Mandate (FRAP 41)

Issuance Time	The mandate is issued 21 days after judgment. A timely petition for rehearing will stay the issuance. If the petition is denied, the mandate will issue 7 days later. A motion for stay of mandate should be promptly filed if parties intend to file a petition for writ of certiorari to the Supreme Court of the United States

Sally Mrvos, Clerk

APPENDIX E

Purposes: County employees are not subject to the over-all civil service provisions of this Charter under its terms at the time of its adoption. Pending City-County consolidation or legislation which would bring them under the City civil service system prior to consolidation, the Personnel Director, with the approval of the Mayor, may make available the services of his office to County agencies so that their personnel systems may be administered on merit principles.

CHAPTER 2

CIVIL SERVICE COMMISSION

Section 7-200. Advisory and Supervisory Functions. The Civil Service Commission shall advise the Mayor and the Personnel Director on problems concerning personnel administration in the City service. It shall make any investigation which it considers desirable and submit recommendations to the Mayor and Personnel Director. It shall approve, modify or disapprove proposed civil service regulations and amendments thereto. It shall promote the improvement of City personnel administration and foster the interest of institutions of learning and of civic, professional and employee organizations in the improvement of personnel standards.

ANNOTATION

Sources: A Model State Civil Service Law, Sections 5 and 8.

Purposes: 1. While the Civil Service Commission is not to administer the civil service system, it is empowered to serve in an advisory capacity to the Mayor and to the Personnel Director on personnel problems and in a supervisory capacity to the Personnel Director through its power to approve, modify or disapprove civil service regulations. Both these functions require that the Commission have the power to investigate all phases of personnel administration and to make appropriate recommendations to the Mayor and to the Personnel Director.

2. The Commission's power in the area of civil service regulations is necessary because the regulations will affect the daily lives of City employees and their content should not be subject to the absolute discretion of a single individual.(Cf. Sections 8-406 and 8-407.)

Section 7-201. Appeals. The Civil Service Commission shall hear and dispose of appeals as provided in this section. Any employee who is dismissed or demoted after completing his probationary period of service, or who is suspended for more than ten days in any one year, may, within thirty days after such dismissal, demotion or suspension, appeal to the Commission for review thereof. Every appeal shall be heard promptly. Upon such review, both the appealing employee and the appointing authority involved shall have the right to be heard publicly and to present evidence; but technical rules of evidence shall not apply. The findings and decisions of the Commission shall be in writing and shall be certified to the Personnel Director.

If the Commission sustains the appeal on the ground that the action complained of was taken by the appointing authority for any political, religious or racial reason, or labor union activity lawful for municipal employees, it shall order the employee to be reinstated to his former position without loss of pay for the period of his suspension. In all other cases where the Commission sustains the appeal of the employee it shall order the reinstatement of the employee in his former position with or without loss of pay for the period of his suspension or direct that he be appointed to a position of equal status in the same office, department, board or commission with or without loss of pay for the period of his suspension. If the Commission overrules the appeal of the employee, it shall confirm the action of the appointing authority which shall be final as of the date it was taken.

Findings and decisions of the Commission and any action taken in conformance therewith as a result thereof shall be final and there shall be no further appeal on the merits, but there may be an appeal to the courts on jurisdictional or procedural grounds.

ANNOTATION

Sources: A Model State Civil Service Law, Section 13.

Purposes: 1. The major function of the Civil Service Commission is to serve as an appellate tribunal in cases involving employees against whom disciplinary action by dismissal, demotion or suspension has been taken. The day-to-day administration of the civil service system is the responsibility of the Personnel Director. See Annotation to Section 7-100.

2. The right to City employment is not an absolute one. On the other hand, employees lack many of the advantages and opportunities of employees engaged in private industry. The City is entitled to obtain the services for which it pays, but some measure of protection has to be afforded to an employee against whom disciplinary action is taken to assure that it is not arbitrary. This section approaches the problem on a basis which seeks to protect the interests of the City, the employee and the taxpayer.

3. An employee is given the right to appeal from action taken against him to the Civil Service Commission. He has this right in the case of any suspension for more than ten days, a limitation imposed to prevent the overburdening of appeal dockets. Upon an appeal, the employee is entitled to be heard publicly and to present evidence in his behalf but he may request a private hearing if he deems that desirable and the appointing authority accedes to his request. The latter qualification is necessary because the interests of the City may sometimes be served by a public hearing. Technical rules of evidence are not applicable because the proceeding is an administrative one and fairness to the employee and to the City requires that all facts pertaining to the case be presented regardless of any legal, exclusionary rules of evidence. Further protection is afforded to the City and to the employee by the requirement that the findings and decisions of the Commission must be in writing. They are to be certified to the Personnel Director so that he may know what action, if any, must be taken.

4. An employee has an absolute right to reinstatement to his former position without loss of pay if his appeal is sustained on the grounds that the action taken against him was

for any political, religious or racial reason, or labor union activity lawful for municipal employees. Merit principles of employment preclude action taken against an employee because of his political beliefs and tenets. Of course, where the reason is that the employee engaged in political action